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Federal Communications Commission
Office of Secretary

October 9, 1996

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW.
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

Re: In the Matter of Implementation of Section 402(b)(1)(A) of the
Telecommunications Act of 1996, CC Docket No. 96-187

Dear Mr. Caton:

Pursuant to Paragraph 49 of the Notice of Proposed Rulemaking in the above captioned matter, enclosed please find an original and sixteen copies of the Comments of the Ad Hoc Telecommunications Users Committee. Please date stamp the additional copy and return it with our messenger.

If you have any questions regarding this filing, do not hesitate to call.

Sincerely,

Alexandra Field
Alexandra M. Field

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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OCT - 9 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
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Implementation of Section 402(b)(1)(A))
of the Telecommunications Act of 1996)
_____)

CC Docket No. 96-187

**COMMENTS OF THE AD HOC
TELECOMMUNICATIONS USERS COMMITTEE**

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October 9, 1996

SUMMARY

The Ad Hoc Telecommunications Users Committee (the "Ad Hoc Committee") supports streamlining requirements that safeguard customer interests.

The NPRM overlooks an obvious interpretation of "deemed lawful." By using this phrase, Congress intended to conform with current practice. If, however, the Commission is committed to choosing another interpretation which would change the current regulatory treatment of LEC tariff filings, then the NPRM's second interpretation of the phrase is a better choice as it provides a more equitable balancing of carrier and customer interests.

The Commission correctly concludes that the language of Section 204(a)(3) provides that any changes to rates, terms and conditions of existing service offerings are eligible for streamlined tariff filing. The Commission also correctly concludes that this excludes new service offerings. As Section 204(a)(3) only provides explicit notice limitations for rate increases and decreases, notice periods for other revisions may be retained in their current length.

The Commission should develop a system that allows for accessible electronic filings. The Ad Hoc Committee additionally recommends: (1) carriers should be required to make filings available to the public on-line by 10 a.m. of the filing day; and (2) Carriers serve tariff transmittals by email.

The Ad Hoc Telecommunications
Users Committee
October 9, 1996

Pre-effective review of tariff transmittals is critical, however, due to the limited time available, additional measure should be put in place to enhance the efficiency of the review process. The requirement that LECs provide enhanced summaries and legal analyses are therefore appropriate measures. However, agrees that the 15-day notice should apply to transmittals containing rate increases and decreases. In streamlined submissions, LECs should place alerts to rate increases and decreases in the "re:" line of transmittal letters.

The Commission must maintain public comment periods. The Ad Hoc Committee accepts a 3-day period for petitions on 7-day public notice filings. However, persons facing rate increases need ample time to protect their interests. Thus, for LEC rate increases filed on 15-day public notice, the Commission should allow parties to petition against these increases up to 7 days after service.

The Commission should not impose standard protective orders whenever a carrier claims that such an order would be applicable, because such orders would threaten the openness of the Commission's processes.

The Ad Hoc Committee supports the NPRM's proposal to require Tariff Review Plan filings absent rate information for carriers subject to price cap regulation. The Commission should establish a filing date of 45 days before the filing of the annual access tariff. The Commission should also establish procedures governing tariff investigations.

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**Before the
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Washington, DC 20554**

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**COMMENTS OF THE
AD HOC TELECOMMUNICATIONS USERS COMMITTEE**

The Ad Hoc Telecommunications Users Committee (the "Ad Hoc Committee") hereby submits its comments filed in response to the Commission's *Notice of Proposed Rulemaking* ("NPRM"), released September 6, 1996, in the above-captioned proceeding. The Commission seeks comment on implementation of Section 204(a)(3) of the Communications Act of 1934, as amended. Section 204(a)(3) reads:

"A local exchange carrier may file with the Commission a new or revised charge, classification, regulation, or practice on a streamlined basis. Any such charge, classification, regulation, or practice shall be deemed lawful and shall be effective 7 days (in the case of a reaction in rates) or 15 days (in the case of an increase in rates) after the date on which it is filed with the Commission unless the Commission takes action under paragraph (1) before the end of that 7-day or 15-day period as appropriate."¹

In this proceeding, the Commission is faced with the task of balancing Congress' desire that the Commission "streamline the procedures for revision by local exchange carriers

¹ Communications Act of 1934, §204(a)(3), 47 U.S.C. 204(a)(3).

of charges, classifications and practices"² with the need to provide continued safeguards for Local Exchange Carrier ("LEC") customers, very few of whom have any alternative source of supply for LEC interstate service.³

I. The Meaning of "Deemed Lawful" (NPRM Section III)

The NPRM tentatively concludes that where Congress used the term "deemed lawful," it intended the term to change the current regulatory treatment of LEC tariff filings. The NPRM neither provides support for this conclusion, nor does it consider the possibility that Congress did not so intend. In considering what sort of changes Congress might have been implying (and despite the fact that Congress has shown itself elsewhere in the Telecommunications Act of 1996 to be capable of making more direct proscriptions), the NPRM overlooks an obvious interpretation of "deemed lawful." The most straightforward construction is that through use of the expression "deemed lawful," Congress intended to conform with current practice and that after rate changes become effective, the revised rates are "legal" rates.

Instead, the NPRM discusses two possible interpretations for the term "deemed lawful." The first interpretation would change the legal status of the tariff revisions that become effective without suspension and investigation. Such revisions would be considered lawful, as if the Commission affirmative forced them to be compliant with the Act. This interpretation would preclude the Commission from later awarding damages

² S. Conf. Rep. No. 104-230, 104th Cong. 2d Sess. 69 (1996) [hereinafter Joint Explanatory Statement].

³ NPRM at ¶ 14.

for the period that revisions are, even if it subsequently found such tariff revisions unlawful.⁴ The second possible interpretation would act to create a presumption of lawfulness in the pre-effective tariff review process that would make it more difficult to suspend the tariff filing.⁵

Both of these interpretations are "strained", but if one must be chosen over the other, the second interpretation, creating a presumption of lawfulness, is the preferable option. This second interpretation yields a more equitable balancing of carrier and customer interests than does the first interpretation in that it would still allow for damages for LEC tariff revisions found unlawful subsequent to the effectiveness of the revisions. To the extent that a LEC holds market power (and they still do) no marketplace forces protect customers from unreasonable LEC provisions. Congress could not have intended to subject customers to monopoly carrier abuse with no realistic opportunity for redress.

Moreover, the second interpretation is more in keeping with the complaint process set up in Section 208 of the Communications Act which provides the Commission with the authority to award damages.⁶ Nothing in the Telecommunications Act or legislative history indicates congressional intent to change availability of damages. As the NPRM's first interpretation would affect the availability of damages, it is not an appropriate interpretation for the Commission to adopt.

⁴ NPRM at ¶¶ 7-11.

⁵ NPRM at ¶ 12.

⁶ 47 U.S.C. §209.

II. LEC Tariffs Eligible for Filing on a Streamlined Basis (NPRM Section IV)

The Ad Hoc Committee supports the Commission's conclusion that "all filings that involve changes to the rates, terms and conditions of existing service offerings are eligible for streamlined treatment."⁷ This conclusion is in keeping with both the language of new Section 204(a)(3) and the stated intent of Congress. In its Joint Explanatory Statement, Congress stated that "[n]ew subsection (b) of Section 402 of the conference agreement addresses regulatory relief that streamlines the procedures for revision by local exchange carriers of charges, classifications and practices under section 204 of the Communications Act."⁸ This language contemplates eligible revisions that are much broader than merely increases and decreases in rates. Thus, the NPRM's conclusion is appropriate.

The above statement of congressional intent also indicates an intent to limit eligibility for streamlined treatment to revisions of existing charges, classifications and practices, which would presumably exclude charges, classifications and practices for new services. The Ad Hoc Committee believes that this exclusion is very important as new services require a more in-depth consideration than can be achieved through the proposed streamlining procedures. The Ad Hoc Committee therefore agrees with the NPRM's interpretation of the first sentence of Section 204(a)(3) whereby the section applies only to tariff revisions for existing services.⁹

⁷ NPRM at ¶ 17.

⁸ Joint Explanatory Statement.

⁹ NPRM at ¶ 18.

Moreover, while the first sentence of Section 204(a)(3) provides for changes to charges, classifications, regulations or practices of existing services, the second sentence only specifies public notice periods for rate increases and decreases. Inasmuch as Congress did not specify public notice periods for any other category of tariff revisions that might be eligible for streamlining, the Commission may determine the appropriate notice period. Indeed, the Commission need not change the public notice period for other tariff revisions made by LECs.

There remains open one more important issue relating to the definition of eligibility -- what is a 'new' service and what is an 'existing' service? In the Price Cap proceedings, the Commission defined new services as services that add to the range of options already available to customers¹⁰ The Ad Hoc Committee proposes that the Commission adopt the Price Cap definition for new services in this proceeding.

III. Streamlined Administration of LEC Tariffs (NPRM Section V)

The NPRM describes the Commission's determination to establish a program for electronic filing and makes a number of proposals in support of this determination.¹¹ The Ad Hoc Committee enthusiastically supports electronic filing requirements, particularly in situations such as streamlined filings, where time periods are short. If the Commission imposes sufficient safeguards, electronic filing could allow users to learn of and to access tariff filings within hours instead of within days. In situations where a

¹⁰ *In the Matter of Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Supplements for Open Network Architecture*, Report and Order, CC Docket No. 89-79

user might only have two, three or seven days to submit their concerns to the Commission, a savings of a few days due to electronic filing by the LEC can make a considerable difference.

In furtherance of speed, efficiency and reliability, the Ad Hoc Committee supports the other conclusions in the NPRM relating to electronic filing.¹² By distributing the responsibility for administration of filings to the carriers, subject to Commission oversight, the Commission would reduce the likelihood of delays due to the bottlenecks that could arise if the Commission, with its limited resources, has the responsibility of putting carrier tariff revisions "on-line." However, this efficiency would have lessened value if the Commission did not also take steps to ensure accessibility and security. Thus, the Ad Hoc Committee supports the requirement of "user friendly" guides and indexes and use of specified software programs.

In addition, the Ad Hoc Committee submits two recommendations that would strengthen the viability of an electronic filing system. First, the Commission should require that all filings be available for access on-line by 10 am on the day that they are filed. By creating a system in which carriers are responsible for seeing that their own tariff filings are on-line and accessible, the Commission also, of course, should allow carriers to file electronically from their offices. With this increased flexibility, the carriers should not have any problem with a requirement of filing early in the day, thus enabling interested parties to access tariff revisions during working hours on the day that the filing is made.

¹² NPRM at ¶ 22.

The Ad Hoc Committee's second recommendation relates to service of interested persons. Carriers should be required to serve tariff revisions by email (to those persons who have indicated that they wish to receive carrier tariff revisions via email). Carriers should confirm electronic service of tariff revisions.

IV. Pre-Effective Review of Streamlined Tariff Filings (NPRM Section V, ¶25)

A. Electronic Filing Procedures

The NPRM questioned whether the Commission should continue to rely on pre-effective review measures to assure LEC compliance.¹³ The Ad Hoc Committee strongly supports continued and strengthened use of pre-effective reviews of tariff transmittals. Customers may suffer significant, perhaps irreparable, damages upon the effectiveness of tariff revisions. As an example, a user might, in light of a new tariff, change access and service configurations. Such changes cause network churn and raise risks of operational disruptions. Post-effectiveness review simply does not provide adequate remedies, particularly when customers of LEC bottleneck services cannot protect themselves through normal commercial precautions. Furthermore, LEC tariffs contain provisions that severely limit carriers' liability, which could reduce the extent of post-effective damage determinations.

The NPRM, in consideration of the Commission's continued undertaking of pre-effective review of tariffs filed on a streamlined basis, requests comments on what procedures should be established to assist the Commission in the process of deciding

¹³ NPRM at ¶25

whether to suspend and investigate a tariff filing. Specifically, the NPRM proposes to require enhanced summaries of the proposed revisions which would explain the basic terms and conditions, how the proposed changes would differ from the current terms and conditions and the expected impact on customers. The NPRM also proposes requiring an analysis showing that the tariff proposal is lawful.¹⁴

The proposed enhanced summary and legal analysis will expedite review by both the Commission and other interested parties, and would not place an unfair burden on LECs.¹⁵ The LECs should already have developed the information contained in the enhanced summaries and should be required to submit such information with proposed tariff changes.

The NPRM also requests comment on the appropriate treatment of tariff transmittals that contain both rate increases and decreases.¹⁶ The Ad Hoc Committee supports the Commission's conclusion that the 15-day notice period should apply in such situations. As a general proposition, rate increases imposed by dominant carriers will cause wider and more significant harm than rate decreases.¹⁷ Allowing carriers to combine both increases and decreases in a tariff filing that only had a 7-day notice period would undermine Congress' intent by opening an avenue for carriers to avoid giving customers 15-day public notice. And, as the NPRM notes, carriers may file the

¹⁴ NPRM at ¶ 25.

¹⁵ NPRM at ¶ 25.

¹⁶ NPRM at ¶ 26.

¹⁷ It is possible that below band tariff filings could raise competitive concerns, but the Commission can alleviate those concerns through the creation of presumptions, as it did in its price cap rules.

rate decreases separately if they are concerned about taking advantage of the 7-day notice option.¹⁸

The NPRM proposes to require that carriers identify tariff transmittals that they are submitting for streamlined processing, and also to require that the carriers identify whether the tariffs contain rate increases, decreases or both (through labels or in the transmittal letter). In light of the Commission's interest in electronic filing, physical labels would not be a relevant choice of identification. Instead, the best solution would be to include the relevant information in the "re:" line of the transmittal letter. This puts the "alert" up front and makes it clearly visible.

Regarding petitions against LEC tariff revisions raising and lowering rates, the NPRM proposes that the petitions be filed within 3 days after the date of LECs filing such tariff revisions. LECs then would have 2 days after service of petitions to reply.¹⁹ The Ad Hoc Committee accepts a 3-day period for filing a petition on a 7-day public notice filing. For LEC rate increases filed on 15-day public notice, the Commission should allow parties to petition against such revisions, 7 days after electronic on-line service. Persons facing a rate increase should have as much time as practical to protect their interests by petitioning against LEC rate increases. Although a 7-day filing period would shorten the time for Commission review of points made, those points will not be made if only two days are available for petitioning against LEC rate increases.

¹⁸ NPRM at ¶ 26.

¹⁹ NPRM at ¶ 28.

B. Rights of Interested Parties to Challenge Pending Tariff Filings

The NPRM also sought comment on whether the “public comment period” preceding the effective date of a tariff filing should be done away with and public comments permitted only as part of an investigation.²⁰ In other words, the Commission appears to be proposing that interested parties be denied any opportunity to challenge a pending tariff filing before it takes effect.

This proposal should be abandoned because it is inconsistent with the Communications Act. As the Commission notes in footnote 52 of the NPRM, Section 204(a) of the Act explicitly provides for challenges to a filing by parties other than the Commission during the period *before* a tariff filing is suspended. Since tariffs cannot be suspended after they take effect, the opportunity to challenge the filing for which Section 204(a) provides can only be an opportunity to intervene before the tariff takes effect. The Commission cannot reasonably interpret the Section to create an opportunity to challenge a filing *after* it takes effect. Section 208 of the Act explicitly provides for such complaints. An interpretation of Section 204(a) which permits challenges only after a tariff is in effect would render the Section superfluous and duplicative of Section 208.

Moreover, Section 204 establishes the Commission’s authority and procedures for reviewing tariff filings before they take effect or are suspended by the Commission. The Section’s reference to “complaints” can reasonably be interpreted only to refer to complaints filed before the effective date of the tariff. Accordingly, the Commission

²⁰ NPRM at ¶ 28.

cannot deny interested parties an opportunity to challenge a filing so long as an interested party challenges the filing during the notice period established by the Commission's rules.

Finally, the proposal to foreclose challenges to tariff filings by interested parties would not serve the public interest. The opportunity for customers or interested member of the public to voice concerns regarding a tariff filing allows parties to raise issues or problems that the Commission might not have seen or considered to be as severe as they actually are.

C. Standard Protective Orders

The Ad Hoc Committee also strongly opposes the NPRM's proposal that the Commission routinely impose standard protective orders whenever a carrier claims that such an order would be applicable.²¹ The openness of the Commission's processes is threatened when relevant data is held to be confidential. The courts hold to very high standards of proof that information should be held confidential, and the Commission should be no less conservative. Thus, actions that suppress such information should be taken only after full consideration of the question by the Commission and after an opportunity to comment by interested persons.

²¹ NPRM at ¶29.

D. Investigations

The NPRM notes that the Commission does not currently have procedural rules governing tariff investigations (although the Commission does, of course, have rules governing *ex parte* presentations in Section 204(a) investigations, the filing of petitions for reconsideration or applications for review of orders terminating investigations, routine public inspection of materials filed in support of tariff filings, and requests for confidential treatment thereof).²² Currently, the procedures for assembling the record of an investigation are established in the orders designating issues for investigation.²³ However, Congress amended Section 204 to provide that the Commission must conclude all hearings initiated under Section 204 within five months after the date the charge, classification, regulation or practice subject to the hearing becomes effective.²⁴ As a result of the five-month limit, the NPRM solicits comment on whether the Commission should establish procedural rules such as page limits and pleading cycles to expedite the hearing process. Consistent, predetermined rules improve efficiency and predictability for members of the public, carriers, and Commission staff alike. Thus, time periods for pleading cycles, page limits, and other reasonable limitations are appropriate and should be developed.

²² NPRM at ¶32.

²³ NPRM at ¶32.

²⁴ 47 U.S.C. §204(a)(2)(A).

Ad Hoc Telecommunications
Users Committee
October 9, 1996

CONCLUSION

For the above-stated reasons, Ad Hoc urges the Commission to adopt regulatory mechanisms that are consistent with the views expressed in these reply comments.

Respectfully submitted,

Ad Hoc Telecommunications User Committee

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Certificate of Service

I, Noel Manalo, hereby certify that true and correct copies of the preceding Comments of the Ad Hoc Telecommunications Users Committee in the Matter of Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996, CC Docket No. 96-187 were served this 9th day of October, 1996 via hand delivery upon the following:

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Noel Manalo

October 9, 1996

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